UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MAHADI SOLAN,

Petitioner,

v.

KEVIN CHAPPELL, Warden,

Respondent.

NO. EDCV 13-01779 SS

MEMORANDUM AND ORDER DENYING PETITION FOR LACK OF JURISDICTION

\\

\\

\\

I.

INTRODUCTION

On September 19, 2013,[1] Mahadi Solan ("Petitioner"), a California state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus (the "Petition") pursuant to 28 U.S.C. § 2254. (Pet. at 19). Petitioner challenges his December 1997 conviction and sentence on one count of first degree burglary in violation of Cal. Penal Code ("Penal Code") § 460(a).[2] On September 24, 2013, Petitioner consented to the jurisdiction of the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636.[3]

---

[1] Under the "mailbox rule," a pleading filed by a pro se prisoner is deemed to be filed as of the date the prisoner delivered it to prison authorities for mailing, not the date on which the court may have received the pleading. Houston v. Lack, 487 U.S. 266, 270, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988); Anthony v. Cambra, 236 F.3d 568, 574-75 (9th Cir. 2000). Here, the Court has calculated the filing date of the Petition pursuant to the mailbox rule as the date the Petition was signed, September 19, 2013. (Pet. at 19) (The Court refers to the pages of the Petition as if they were consecutively paginated).

[2] As discussed below, Petitioner was convicted and sentenced on four counts of first degree burglary in two separate cases (Riverside County Superior Court case numbers INF 27418 and INF 27716) that were subsequently consolidated before the California Court of Appeal. Petitioner challenged all of these judgments in previous federal habeas petitions; however, the instant Petition challenges only his conviction and sentence on one count of first degree burglary from case number INF 27418. (See Pet. at 2).

[3] Consent is the "touchstone of magistrate jurisdiction[,]" Anderson v. Woodcreek Venture Ltd., 351 F.3d 911, 914 (9th Cir. 2003), and "[u]pon the consent of the parties," a magistrate judge "may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case." 28 U.S.C. § 636(c)(1). Where, as here, the petitioner or plaintiff consents to magistrate judge jurisdiction and the respondent or defendant has neither received service of process nor appeared in

the action, a magistrate judge may properly exercise consent jurisdiction over the case. A defendant or respondent who does not receive service or make an appearance in a proceeding is not a "party" to that case. See Travelers Cas. & Sur. Co. of Am. v. Brenneke, 551 F.3d 1132, 1135 (9th Cir. 2009) ("A federal court is without personal jurisdiction over a defendant unless the defendant has been served in accordance with Fed. R. Civ. P. 4."); see also Cardenas v. Vail, 2010 WL 1537545, at *1 (W.D. Wash. March 5, 2010) ("A defendant who has not appeared in an action and has not been personally served is not a party to the action and the court does not have personal jurisdiction over that defendant.") (citing Omni Capital Int'l, Ltd. V. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987)). Because § 636(c)(1) requires the consent only of the "parties" in a case, the "lack of written consent from [defendants who have not been served cannot] deprive [a] magistrate judge of jurisdiction" even if the sole consenting "party" is the plaintiff or petitioner. Neals v. Norwood, 59 F.3d 530, 532 (5th Cir. 1995) (holding that magistrate judge retained consent jurisdiction over and properly dismissed pro se prisoner's 42 U.S.C. § 1983 claims where plaintiff consented, but the unserved defendants did not). Indeed, numerous federal courts recognize that a lack of non-party consent cannot destroy a magistrate judge's § 636(c)(1) jurisdiction. See, e.g., Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266, 269 (7th Cir. 1998) (holding that unnamed class members are not "parties" and, as such, cannot "deprive [a] magistrate judge of jurisdiction" by withholding their consent); United States v. Real Property, 135 F.3d 1312, 1316-17 (9th Cir. 1998) (holding that where magistrate judge entered default judgment against record owner's interest in property in an in rem forfeiture action, "it [was] unnecessary to obtain [the record owner's] consent" because he failed to establish standing as a "party to the action"); Brown v. Boca, 2013 WL 502252, at *1 n. 2 (C.D. Cal. Feb. 8, 2013) (dismissing state prisoner's federal habeas petitions before respondent filed an answer where petitioner consented to magistrate judge's jurisdiction and respondent "ha[d] not yet been served with the Petition and therefore [wa]s not a party to this proceeding."); Third World Media, LLC v. Doe, 2011 WL 4344160, at *3 (N.D. Cal. Sept. 15, 2011) ("The court does not require the consent of the defendants to dismiss an action when the defendants have not been served and therefore are not parties under 28 U.S.C. § 636(c)."); Kukiela v. LMA Prof'l Recovery Group, 2011 U.S. Dist. LEXIS 85417, at *1 n.1 (D. Ariz. Aug. 1, 2011) ("Plaintiff consented to proceed before a United States Magistrate Judge for all proceedings in this case, including entry of final judgment, pursuant to 28 U.S.C. §636(c)(1) . . . . Because Defendant did not appear and establish

(Dkt. No. 3). On November 6, 2013, the Court issued an Order To Show Cause Why This Action Should Not Be Dismissed As Successive (the "Order to Show Cause" or "OSC"). However, as of the date of this Memorandum and Order, Petitioner has not filed a response to the OSC or any other document in this action. Accordingly, for the reasons discussed below, the Petition is DENIED for lack of jurisdiction and Judgment is entered dismissing this action without prejudice.

\\

\\

\\

\\

\\

\\

\\

\\

\\

---

its standing as a party in this action, the Magistrate Judge has jurisdiction to enter the requested default judgment."); Williams v. Ahlin, 2011 WL 1549306, at * 6-7 (E.D. Cal. April 21, 2011) (holding that magistrate judge had jurisdiction to enter final order against habeas petitioner who signed and filed a consent form despite "the absence of consent from the named respondent, who has not appeared in this action."); Quigley v. Geithner, 2010 WL 3613901, at *1 (D. Idaho Sept. 8, 2010) (dismissing complaint where "[p]laintiff, the only party appearing in this case, has consented to the jurisdiction of a United States Magistrate Judge to enter final orders in this case."); Ornelas v. De Frantz, 2000 WL 973684, at *2 n.2 (N.D. Cal. June 29, 2000) (dismissing pro se plaintiff's § 1983 claim and noting "[t]he court does not require the consent of defendants in order to dismiss this action because defendants have not been served, and, as a result, are not parties under the meaning of 28 U.S.C. § 636(c).").

II.

PRIOR PROCEEDINGS[4]

After a bench trial in Riverside County Superior Court, case number INF 27418, Petitioner was convicted and sentenced on three counts of first degree burglary in violation of Penal Code § 459 and one count of receiving stolen property in violation of Penal Code § 496. (See Mahadi Solan v. Silvia Garcia, EDCV 00-00566 RT (BQR), Final Report and Recommendation ("2001 R&R"), Dkt. No. 14 at 3). The Court also found true that Petitioner had three prior convictions pursuant to California's Three Strikes Law, Penal Code §§ 667(c), 667 (e)(2), 667.5(b), and sentenced Petitioner to seventy-eight years to life imprisonment. (See id.). In a separate trial in Riverside County Superior Court, case number INF 27716, Petitioner was found guilty on one additional count of first degree burglary. Again, the Court found true that Petitioner had three prior strikes, and Petitioner was sentenced to forty years to life in state prison. (See id. at 3-4).

\\

\\

\\

---

[4] The Court takes judicial notice of the federal habeas petitions Petitioner filed in the Central District in 2000 and 2006, case numbers EDCV 00-00566 RT (BQR), EDCV 00-00724 VAP (BQR), EDCV 00-00725 VAP (BQR), EDCV 00-00726 VAP (BQR), EDCV 00-00727 VAP (BQR), EDCV 00-00728 VAP (BQR), EDCV 06-00049 MMM (SS), EDCV 06-00264 MMM (SS), EDCV 06-00267 MMM (SS) and EDCV 06-00268 MMM (SS). See, e.g. Briggs v. Terhune, 334 F.3d 910, 915 n.3 (9th Cir. 2003) (materials from a proceeding in another tribunal are appropriate for judicial notice) (citation omitted); United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992).

The two cases were then consolidated for appeal in the California Court of Appeal, and on December 9, 1998, the court modified Petitioner's sentence but otherwise affirmed the trial court's judgments. (See id. at 4).

On September 30, 1999, Petitioner filed a habeas petition in the California Supreme Court claiming ineffective assistance of appellate counsel on direct review, which the supreme court denied on January 25, 2000.[5] (See id.).

Between July 10, 2000 and September 7, 2000, Petitioner filed six habeas petitions in this Court, case numbers EDCV 00-00566 RT (BQR), EDCV 00-00724 VAP (BQR), EDCV 00-00725 VAP (BQR), EDCV 00-00726 VAP (BQR), EDCV 00-00727 VAP (BQR) and EDCV 00-00728 VAP (BQR). (See id. at 3-4). On January 18, 2001, the six petitions were consolidated, (see id., Minute Order, Dkt. No. 11), and on April 23, 2001, the Magistrate Judge issued a Final Report and Recommendation denying Petitioner habeas relief. (See id., 2001 R&R). That same day, the District Judge adopted the Report and Recommendation and entered judgment dismissing Petitioner's claims. (Id., Dkt. Nos. 15&16). On May 29, 2001 the District Judge denied Petitioner's request for a certificate

[5] Since 2003, Petitioner has filed numerous state habeas petitions in California's Court of Appeal and Supreme Court challenging his burglary convictions, which have all been resolved against him. (See California Appellate Courts Case Information Website, Case Nos. S208160, S208164, S208165, S208166, S208167, S206709, S200542, E033606, E033647 , E033648, E033649, E033650, E044773, E044774, E044775, E044776, E044777, E048859, E048861, E048863, E048864, E048860, E055349 and E057316).

of appealability. (Id., Dkt. No. 17). Petitioner then requested a certificate of appealability from the Ninth Circuit, and, on September 28, 2001, the court of appeals deemed Petitioner's request withdrawn and denied it as moot. (Mahadi Solan v. Silvia Garcia, EDCV 00-00274 RT (BQR), Dkt. No. 28).

Over four years later, Petitioner filed four separate habeas petitions in the Central District between January 17, 2006 and March 9, 2006, case numbers EDCV 06-00049 MMM (SS), EDCV 06-00264 MMM (SS), EDCV 06-00267 MMM (SS) and EDCV 06-00268 MMM (SS). Each petition attacked the same convictions and sentences that Petitioner challenged in his earlier federal petitions. (See Mahadi Solan v. Giurbino, Warden, EDCV 06-00049 MMM (SS), Order Summarily Dismissing Petitions for Lack of Jurisdiction ("Dismissal Order"), Dkt. No. 7 at 4). The four petitions were consolidated on March 10, 2006, (see id., Order of Consolidation, Dkt. No. 6), and on March 15, 2006, the Court deemed the petitions successive and dismissed them for lack of jurisdiction. (See Dismissal Order). Petitioner did not seek a certificate of appealability from the Ninth Circuit. More than seven years later, Plaintiff filed the instant Petition on September 19, 2013.

\\

\\

\\

\\

\\

\\

III.

PETITIONER'S CLAIMS

Petitioner raises four grounds for federal habeas relief. (See Pet. at 5-10). However, the gravamen of each claim is essentially the same, i.e., that Petitioner was convicted and sentenced absent sufficient evidence that he committed the "entry" element of first degree burglary.[6] In Ground 1, Petitioner contends that his "alleged entry into said inhabited dwelling house was never shown by Deputy Sheriff nor established by Prosecution of any reasonable proof[.]" (Pet. at 5). In Ground 2, Petitioner alleges that the deputy sheriff "falsely imprisoned [him] without shown [sic] reasonable proof of Petitioner's entry[.]" (Id.). In Ground 3, Petitioner claims that the trial judge improperly found that Petitioner "entered" an inhabited dwelling. (Id. at 10). Finally, in Ground 4, Petitioner argues that based on Grounds 1 through 3, he is being unlawfully imprisoned by the warden of the prison in which he is currently incarcerated. (Id.)

Because each ground attacks the sufficiency of the evidence that Petitioner committed the "entry" element of first degree burglary, the Court treats the Petition as though it sets forth a single basis for habeas relief.

---

[6] "The elements of first degree burglary in California are (1) entry into a structure currently being used for dwelling purposes and (2) with the intent to commit a theft or felony." People v. Sample, 200 Cal. App. 4th 1253, 1261, 133 Cal. Rptr. 3d 421 (2011).

V.

DISCUSSION

A. The Petition Is Successive And Must Be Dismissed For Lack Of Jurisdiction

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies to the instant Petition because it was filed after AEDPA's effective date of April 24, 1996. Lindh v. Murphy, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). AEDPA operates as a "gatekeeping mechanism" that generally requires the dismissal of claims presented in successive habeas petitions. Beltran v. Dexter, 568 F. Supp. 2d 1099, 1104 (C.D. Cal. 2008); see also Woods v. Carey, 525 F.3d 886, 888 (9th Cir. 2008) (citing 28 U.S.C. § 2244(b)(3)). Where a prisoner "asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed in all cases." Tyler v. Cain, 533 U.S. 656, 661, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001) (citations omitted). If a prisoner asserts a claim in a successive petition that he did not previously present, the claim must still be dismissed unless (1) it is predicated on newly discovered facts that call into question the accuracy of a guilty verdict, or (2) it relies on a new rule of constitutional law. Id. (citing 28 U.S.C. §2244(b)(2)).

Although AEDPA does not define the terms "second or successive," the Supreme Court and the Ninth Circuit (as well as other circuit courts) have "interpreted the concept incorporated

in this term of art as derivative of the 'abuse of the writ' doctrine developed in pre-AEDPA cases." Allen v. Ornoski, 435 F.3d 946, 956 (9th Cir. 2006) (internal quotations omitted). Accordingly, a habeas petition is second or successive "if it raises claims that were or could have been adjudicated on the merits[]" in a previously filed petition. McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009). A petition is also successive if it challenges the same custody imposed by the same state court judgment that an earlier federal petition attacked. See Burton v. Stewart, 549 U.S. 147, 153, 127 S. Ct. 793, 166 L. Ed. 2d 628 (2007).

Here, the instant Petition is clearly successive because (1) Petitioner could have raised his insufficiency of the evidence claim in his 2000 and 2006 federal petitions, and (2) his previous petitions attacked, inter alia, the first degree burglary conviction and sentence at issue here. First, in his earlier federal petitions, Petitioner claimed that he was entitled to habeas relief because his appellate counsel failed to advance an insufficiency of the evidence challenge to his burglary convictions. (See Mahadi Solan v. Giurbino, Warden, EDCV 06-00049 MMM (SS), Order Summarily Dismissing Petitions for Lack of Jurisdiction ("Order Dismissing"), Dkt. No. 7 at 4-5; Mahadi Solan v. Sylvia Garcia, EDCV 00-00566 RT (BQR), 2001 R&R at 11-13). Accordingly, Petitioner was aware of the factual predicate to his instant insufficiency of the evidence claim when he filed his previous federal petitions in this Court. Thus, the instant Petition is successive. See, e.g., Cooper v. Calderon,

274 F.3d 1270, 1273 (9th Cir. 2001) (petition was successive where petitioner "was aware of the factual predicate of []his claim long ago and could have raised the claim in his first petition").

Second, even if Petitioner was unaware of the facts underlying his current insufficiency of the evidence claim in 2000 and 2006, the instant Petition challenges the same custody imposed by the same state court judgment that Petitioner has twice-before attacked in this Court. Although the instant Petition challenges only Petitioner's conviction and sentence on one count of first degree burglary, Petitioner attacked this judgment – as well as the three other first degree burglary judgments against him – in his prior federal petitions. (See Mahadi Solan v. Giurbino, Warden, EDCV 06-00049 MMM (SS), Order Dismissing at 2-6; Mahadi Solan v. Sylvia Garcia, EDCV 00-00566 RT (BQR), 2001 R&R at 3, 9-13). The instant Petition is therefore successive. See, e.g., Burton, 549 U.S. at 153; McNabb, 576 F.3d at 1029.

Because the instant Petition is successive, the Court lacks jurisdiction to consider its merits absent permission from the Ninth Circuit. See 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."); Cooper, 274 F.3d at 1274 (when AEDPA "is in play, the district court may not, in the absence of proper

authorization from the court of appeals, consider a second or successive habeas application"). Indeed, even if Petitioner could demonstrate that his claim qualifies as an exception to AEDPA's bar on claims appearing in successive petitions, see 28 U.S.C. § 2244(b)(2), he would have to seek and obtain authorization from the Ninth Circuit before this Court could adjudicate the instant Petition. See Woods, 525 F.3d at 888. The docket indicates that Petitioner has not, despite the Court's warning in the OSC, requested or received permission from the Ninth Circuit to file this Petition. This action must therefore be dismissed for lack of jurisdiction without prejudice to its refilling when Petitioner obtains the requisite authorization. [7]

---

[7] Were it not successive, the instant Petition would be barred as untimely. See 28 U.S.C. § 2244(d)(1)(A). Direct review of Petitioner's conviction ended on June 16, 2003, (Pet. at 3), and his case became "final" for AEDPA purposes on September 14, 2003. See Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999) (holding that the period of direct review for the purposes of AEDPA's limitations period "includes the period within which a petitioner can file a petition for writ of certiorari from the United States Supreme Court."); Sup. Ct. R. 13 (allowing a petition for a writ of certiorari seeking review of a state court of last resort to be filed within 90 days after entry of judgment). The statute of limitations began to run the next day and expired one year later, on September 15, 2004. Therefore, absent tolling, the instant Petition is untimely by nine years and four days.

Petitioner is not entitled to statutory tolling, see Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed[]"), and he has made no showing of an entitlement to equitable tolling. See Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002) (holding that habeas petitioners have the burden of proof to show equitable tolling). Furthermore, Petitioner has not offered the Court "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at

B. Any Further Frivolous Filings That Ignore This Court's Prior Rulings May Result In Sanctions Or A Recommendation That Petitioner Be Deemed A Vexatious Litigant

Petitioner has now filed eleven separate petitions in this Court, each time with the same result. The Court has explained that it does not have jurisdiction to hear Petitioner's successive petitions absent authorization from the Ninth Circuit. However, Petitioner has proved unwilling to heed this warning. Therefore, Petitioner is advised that any future filings in the Central District that ignore the Court's prior rulings may result in the imposition of sanctions against him or the recommendation that he be deemed a vexatious litigant.

VI.

CONCLUSION

For the foregoing reasons, the instant Petition is DENIED and this action is DISMISSED without prejudice for lack of jurisdiction.

DATED: December 27, 2013

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

---

trial[]" demonstrating "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Lee v. Lampert, 653 F.3d 929, 938 (9th Cir. 2011) (internal quotation marks omitted) (quoting Schlup v. Delo, 513 U.S. 298,324, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)). Accordingly, the instant Petition is untimely.